



CALIFORNIA MOTOR CAR DEALERS ASSOCIATION

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September 24, 2004

Joanne Kozberg
Bill Hauck, Co-Chairs
California Performance Review Commission
1400 10th Street
Sacramento, California 95814

***Re: California Performance Review – New Motor Vehicle Board
Hearing: Monday, September 27, 2004***

Dear Ms. Kozberg and Mr. Hauck:

The California Motor Car Dealers Association (CMCDA) is a statewide trade association that represents the interests of over 1400 franchised new car and truck dealer members. CMCDA members are primarily engaged in the retail sale and lease of new and used motor vehicles, but also engage in automotive service, repair and part sales. We are writing to register our opposition to a specific recommendation of the California Performance Review (CPR) which suggests that the New Motor Vehicle Board (NMVB) be eliminated.

Specifically, as part of its recommendations that 117 state boards and commissions should be abolished, the CPR authors suggested the following concerning the NMVB:

New Motor Vehicle Board

Eliminate the Board. The dispute resolution function should be handled by the parties directly. There is no need for a governmental body to take on this work. Furthermore, consumer complaint mediation should be a core function of the Office of Consumer Protection within the new Department of Commerce and Consumer Protection.

The CPR's objections can be summarized as: (1) Dispute resolution between auto manufacturers and their franchised dealers should be left to the parties (or presumably the court system or the DMV); and (2) Consumer mediation is more properly placed with the proposed Office of Consumer Protection.

Background.

The new car franchise system offers a host of benefits for California consumers because it provides a well organized distribution system for the availability of new vehicles; a network of quality warranty and repair facilities; and, a cost-effective method for the state to police those systems through the licensing of private sector franchisors and franchisees. The franchise system is kept in check by: (1) the Automotive Franchise Act – a body of law that ensures a competitive marketplace by leveling the playing field between locally owned and operated franchised new car dealers and multi-national auto manufacturers; and (2) the independently appointed NMVB.

The NMVB is a legislatively created administrative body within the Department of Motor Vehicles (DMV) that is vested with authority to participate in and oversee certain regulatory functions concerning the licensed activities of new motor vehicle dealers, manufacturers and distributors.¹ The NMVB is a special fund agency which derives all of its operating funds from fees assessed on all motor vehicle dealers, automobile manufacturers, and distributors licensed in the state² and is composed of 9 members: 5 public members and 4 new car dealers (7 of the members are appointed by the Governor, 1 by the Speaker of the Assembly and 1 by the Senate Rules Committee).³ The dealer members of the NMVB are statutorily prohibited from participating in NMVB proceedings involving a protest filed against a manufacturer.⁴

Vehicle Code Section 3050 sets forth the jurisdictional authority of the NMVB and charges it with the following functions:

- To promulgate regulations necessary to govern matters specifically committed to its jurisdiction [3050(a)].

¹ See Chapter 6 (commencing with section 3000) of Division 2 of the Vehicle Code. The NMVB was originally named the “New Car Dealers Policy and Appeals Board”, (see Chapter 1397, Statutes of 1967). The Board was renamed in 1973 when its jurisdiction was expanded to include specified authority over motor vehicle manufacturers and distributors; and, to hear, consider, and decide protests against specified manufacturer actions, (see Chapter 996, Statutes of 1973). The NMVB’s jurisdiction over new motor vehicle dealers and manufacturers includes new motorcycle dealers and manufacturers, as well as recreational vehicle dealers and manufacturers.

² See V.C. Section 3016.

³ See V.C. Section 3001.

⁴ See V.C. Sections 3050 and 3066. The dealer members of the NMVB were originally permitted to participate in all NMVB proceedings until a series of court challenges held that practice to violate due process of law under both the California and U.S. Constitutions. See American Motors Sales Corp. v. New Motor Vehicle Board, (May 1977) 69 C.A. 3d 983, 138 Cal.; Chevrolet Motor Division v. New Motor Vehicle Board, (1983) 146 Cal. App 3d 533, 194 Cal. Rptr. 270 [1st Dist.] and Nissan Motor Corp. v. New Motor Vehicle Board, (1984) 153 Cal App. 3d 109, 202 Cal Rptr. 1 [4th Dist.]; and, University Ford v. New Motor Vehicle Board (1986) 179 Cal. App.3d 796, 224 Cal. Rptr. 908 [4th Dist].

- To sit as an oversight panel for the appeal of license accusations prosecuted by DMV against new motor vehicle dealers and auto manufacturers [3050(b)].⁵
- To hear and consider protest cases filed by franchised new motor vehicle dealers against their franchisors [3050(d)]. There are five types of protest actions the NMVB is authorized to hear, each of which is defined by separate statute.⁶ When considering a protest case, the NMVB is required to follow specified procedures⁷ and is charged with making a variety of public policy findings. After hearing and considering a protest case, the NMVB is authorized to issue a written decision to sustain, conditionally sustain, overrule, or conditionally overrule a protest.⁸ Judicial review, while available⁹, is by way of a writ of administrative mandate to the Superior Court, where the Board's factual findings are reviewed under the substantial evidence test.¹⁰
- To “Consider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative ... submitted by any person” [3050(c)]. After such consideration the NMVB may do any one or combination of the following:
 1. Direct DMV to conduct an investigation and make a written report.
 2. “Undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between a member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor branch, or representative.”

⁵ See Article 3 (commencing with section 3052) of Chapter 6 of Division 2 of the Vehicle Code. Alleged violations of dealer and manufacturer licensing provisions enumerated in Chapter 4 (commencing with section 11700) of Division 5 of the Vehicle Code are prosecuted by DMV through the filing of a license accusation pursuant to Vehicle Code Sections 11705, 11705.4 and 11705.5. After the filing of a license accusation, the matter is referred to the Office of Administrative Hearings for assignment to an administrative law judge for hearing pursuant to Chapter 5 (commencing with section 11500) of Division 3 of Part 2 of the Government Code. Following an administrative hearing, the administrative law judge issues a proposed decision which may then be adopted, rejected, or modified by the DMV Director (see Government Code Section 11517). The Director's decision is then appealable to the NMVB pursuant to Vehicle Code Section 3052.

⁶ See Article 4 (commencing with section 3060) of Chapter 6 of Division 2 of the Vehicle Code, which vests new motor vehicle dealers with the right to protest before the NMVB: the termination or modification of a franchise; the establishment or relocation of a dealership within the 10-mile relevant market area of another dealer of the same line-make; and, the reasonableness and timeliness of manufacturer reimbursements for predelivery, warranty, and incentive program payments.

⁷ See V.C. Section 3066.

⁸ See V.C. Section 3067.

⁹ See V.C. Section 3068.

¹⁰ *Kawasaki Motors Corp. v. Superior Court* (2000) 85 Cal. App.4th 200, 203; *American Isuzu Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal. App.3d 464, 474

3. Order DMV to take disciplinary action against the license of a new motor vehicle dealer, manufacturer, or distributor.

CMCDA is opposed to the NMVB's elimination for the following reasons:

The NMVB is wholly supported by dealer/manufacturer fees.

One of the principal criticisms leveled at most of the boards and commissions suggested for elimination in the CPR report is that those agencies are a drain on the state treasury. In the case of the NMVB, the board is entirely supported by its users: dealers and manufacturers. The agency derives none of its \$1.78 *million* annual budget from the state's General Fund. Rather, the NMVB's entire operating budget is derived from fees collected from auto manufacturers and new motor vehicle dealers – who believe they receive a tremendous benefit for the fees they pay. For an industry that: represents over 20% of the state's retail economy; employs 148,000 people; sells or leases over 2 million vehicles annually; generated over \$93 billion in 2003 total dealership sales; and last year collected or paid \$5.28 billion in federal, state, and local taxes -- the NMVB is one of the best bargains in state government! Moreover, the consumer mediation program which assists consumers is paid for, not by consumers, but by the regulated entities involved in the manufacture and retail sales of new vehicles.

The NMVB is required to make non-judicial determinations of public policy issues.

The need for appropriate governmental control over unbridled manufacturer discretion in termination and establishment of new motor vehicle dealerships is well documented.¹¹ However, a formulaic approach for determining when and where to impose such controls is foreclosed by the unique circumstances presented by each community, market area, and dealer. In recognition of these facts, the California statutes governing vehicle dealer termination¹² and establishment (and relocation)¹³ have vested the Board with authority to impose those controls based upon a determination of "good cause." Good cause is defined somewhat differently for dealer termination protests¹⁴ as opposed to protests against establishment (or relocation) of additional dealerships in an already-represented relevant market area.¹⁵ In either case, the Board's good cause determination must take into consideration not only the needs of consumers of the particular line-make in the relevant market area, but also the public welfare generally. Several other good cause factors enumerated in the respective statutes must be considered

¹¹ See e.g., *New Motor Vehicle Bd. v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 100-102, fn 4, 7.

¹² Vehicle Code §§ 3060 and 3070.

¹³ Vehicle Code §§ 3062 and 3072.

¹⁴ Vehicle Code §§ 3061 and 3071.

¹⁵ Vehicle Code §§ 3063 and 3073.

as well. In addition, the enumerated good cause factors are not exclusive -- the Board is also to consider any other existing circumstances in making its good cause determination.

Once it is recognized that the Board's good cause determination involves a searching inquiry into each of the factors and all of the circumstances, with a focus on the public welfare, it is evident that private arbitration and judicial adjudication of the question of good cause are inappropriate. In the case of private arbitration, the arbitration forum would not only lack any measure of accountability to the public, but would also bar the public from access to its procedures, hearings, determinations, and perhaps its very existence. And to mandate that the courts make such determinations would appear to force the courts to engage in a legislative or executive function, thus conflicting with California constitutional dictates to preserve the separation of powers.

The separation of powers issue in this very context was addressed by the Illinois Supreme Court in the *Fields* case,¹⁶ where it was held that by assigning to the courts the task of hearing dealership relocation protests (wherein a good cause standard fairly similar to California's is applied), the legislature had impermissibly delegated for judicial examination matters (including determinations of the public interest) which are for legislative or administrative determination, in violation of the separation of powers clause of the Illinois constitution.¹⁷ And the Nevada Supreme Court determined in a 1979 case¹⁸ that courts were not equipped to apply the good cause factors under a similar Nevada statute.

The analysis of the court in *Fields* is pertinent here:

The answers to these questions [the statutory elements to be considered], several of which are subjective and/or speculative in nature and involve competing public and private interests, require judicial assessment of numerous economic, demographic, business, and industry related issues rather than the application of any fixed standards or rules of law to a set of facts, which if they existed, would allow or not allow the dealership relocation.

Moreover, a court is not mandated by the statute to consider all or any of the enumerated factors but may, instead or in addition, *sua sponte* raise and consider whatever factors and circumstances which it believes are or may be pertinent to the question of whether there is good cause to allow a particular dealership relocation.

Finally, the Act calls upon the judiciary to determine whether the proposed relocation of a dealership would be beneficial or injurious to the public welfare ... and in the public interest.... [It] does not, however,

¹⁶ *Fields Jeep-Eagle, Inc. v. Chrysler Corp.* (1994) 163 Ill. 2d 462, 645 N.E.2d 946

¹⁷ Article III, section 3 of the California constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

¹⁸ *Desert Chrysler-Plymouth v. Chrysler Corp.* (1979) 95 Nev. 640, 600 P.2d 1189.

identify what is in the public welfare or what the public interest is. Assuming that these determinations are interrelated to the other considerations enumerated in section 12(c) and further assuming that a court considers only those factors, the court must still independently decide how much weight to give each factor and how the various competing interests reflected therein should be balanced against each other in order to decide what, in the court's opinion, is in the public interest and welfare. As noted above, some of the factors set forth in section 12(c) reflect concern for the economic viability of the dealerships, others pertain to the manufacturers' interests in promoting and selling their lines of vehicles through solvent, honest and competent dealerships, while others relate to the protection of consumers by promoting adequate competition and customer convenience in matters relating to price and service.

The NMVB's function of investigating and reconciling the good cause factors is thus essential and indispensable to a valid, neutral, and publicly-accountable means of determining when and how governmental checks on manufacturer discretion should be applied consistent with the public welfare.

Consumer Mediation at the NMVB Works.

As the NMVB's mediation brochure states: "The California New Motor Vehicle NMVB has the authority to mediate *all types of disputes* between members of the public and new car dealers *and* manufacturers." [Emphasis added]. This *free* program (which is paid for by fees charged to dealers and manufacturers, not consumers or the state's General Fund) is a cost-effective means to resolve disputes prior to expensive litigation. The NMVB does not have enforcement authority over lemon law disputes, which remain properly within the jurisdiction of the Department of Consumer Affairs. Nor can the NMVB order the manufacturer or dealership to replace a vehicle or refund the purchase price. Despite these limitations, the NMVB's efforts frequently result in an acceptable resolution of the dispute.¹⁹ We see no reason to eliminate this valuable resource for California consumers. In fact, our dealer members are committed to strengthening the program and better publicizing it so that more consumers can take advantage of this important service.

The DMV Director should not be prosecutor, judge and jury.

The Legislature's decision to create a citizen appeal board for DMV disciplinary actions was predicated upon the fact that the DMV Director is placed in the difficult position of being directly responsible for the functions of DMV investigators and

¹⁹ In FY 2002-03 the Consumer Mediation Program received 3,928 phone calls and opened 418 mediation cases. Of those 418 cases, NMVB representatives were able to fully resolve 37% of them to the consumer's satisfaction. Similar resolution rates were also seen in FY 2000-01 and 2001-02.

Joanne Kozberg
Bill Hauck
September 24, 2004
Page 7

prosecutors; and, of serving as judge, jury, and disciplinarian in license accusation cases. In this respect, the membership of the NMVB was structured to provide a balance of expertise and protection of the public interest. The NMVB's long-standing authority to consider appeals of disciplinary decisions of the DMV Director is a rarely used, but an important check on the Director. Rather than immediately turning over such disputes to the court system, the current mechanism allows the NMVB to reexamine significant cases.

A review of the NMVB's disposition summary for years 1992-2002 shows that only six appeals were heard during this period *and none during the last five years*. Of those, two affirmed the Director's decision, two amended the Director's decision, one was revoked prior to the NMVB's hearing it and one was reversed by the NMVB. In contrast, the NMVB staff considered 802 protest and petition cases during this period, 94% of which were settled prior to the NMVB hearing the case. In short, we believe there is no evidence that this system is not working as intended and therefore there is no compelling reason to change it.

Conclusion.

Based upon the foregoing, we respectfully urge the California Performance Review Commission to reject the CPR's proposed elimination of the New Motor Vehicle NMVB. Should you or your staff have any questions or comments, please do not hesitate to contact me.

Very truly yours,



Peter K. Welch
President

PKW:lh

cc: The Honorable Arnold Schwarzenegger
Sunne Wright McPeak, Secretary, Business, Transportation & Housing Agency
Chon Guttierrez, Director, DMV
Glenn Stevens, President, NMVB
Tom Novi, Executive Director, NMVB